Supreme Court, U. S.
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IN THE

Supreme Court of the United States

Docket No. 79-469

NORMAN B. OPPENHEIMER,

Petitioner,

versus

ELECTRO-NUCLEONICS, INC., AVELINO FIEL, Estate of ALFRED BERG, Deceased, BERTHA L. BERG as Executrix, HAROLD WM. HARRISON, HERBIERTO FEBUS BERNARDINI, MARIANO CABRERA, CONBOY, HEWITT, O'BRIEN AND BOARDMAN, ESQS., a Partnership,

Respondents.

BRIEF OF RESPONDENTS CONBOY, HEWITT, O'BRIEN & BOARDMAN, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Opinions Below

The opinion of the Court of Appeals for the Second Circuit, and the judgment of the United States District Court for the Southern District of New York are annexed to Petitioner's Writ of Certiorari as Appendix A and Appendix B, respectively.

STATUTES INVOLVED

The pertinent statutory provisions are §17(a) of the Securities Act of 1933, 15 U.S.C. §77Q(a); Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78J(b); 28 U.S.C. 1343; 42 U.S.C. 1985.

QUESTIONS PRESENTED

(1) Whether petitioner's complaint failed to state a claim upon which relief may be granted?

(2) Whether petitioner was barred from bringing this action under the traditional principles of *res judicata* and collateral estoppel?

STATEMENT OF THE CASE

This action has a long history dating back to 1969. Respondent Conboy, Hewitt, O'Brien & Boardman ("Conboy, Hewitt"), a firm of attorneys, first became involved in this litigation as a result of its service of an interpleader complaint, on behalf of its client Electro-Nucleonics, Inc. ("Electro") in Civil Action File No. 69 Civ. 1616. An outline of the history of this action will demonstate that there has been no departure from accepted judicial proceedings.

In 1963, Electro, as an incident to a public offering of its securities, caused a common stock purchase warrant, No. W104, to be issued, authorizing petitioner, Norman B. Oppenheimer ("Oppenheimer"), or his registered assignees, to purchase 2,250 shares of common stock of Electro at a purchase price of $5.00 per share.

Thereafter Electro was presented with conflicting claims as to the ownership of the warrant. Oppenheimer requested that Electro allow him to exercise the warrant and he forwarded a check in the amount of $11,250. Respondent Avelino Fiel ("Fiel"), likewise attempted to exercise the warrant and claimed that said warrant had been assigned to him in blank and made bearer in nature by Oppenheimer. Fiel also forwarded a check in the amount of $11,250 to Electro.

By order of the Hon. Milton Pollack dated April 23, 1969, on motion of Conboy, Hewitt, on behalf of Electro, permission was granted to Electro to serve a summons and interpleader complaint on Oppenheimer, Fiel, Mariano Cabrera, Cesar J. Febus Bernardini and Madrid Hotel Corporation. It was likewise ordered, *inter alia,* that the warrant, the ownership of which was a matter of dispute, and which was previously deposited in the Registry of the Court by Electro, be retained therein pending determination of the proceeding. Oppenheimer and Fiel were enjoined, by that order from instituting or prosecuting any suit or proceeding against Electro on account of the warrant until the further order of the Court. Oppenheimer and Fiel were ordered to show cause why Electro should not be discharged from liability except as to the party the Court should adjudge entitled to exercise the warrant, and to show cause why the injunction against them should not be made permanent. (A 3)*

By Order of the Hon. Charles M. Metzner dated May 13, 1969, Electro was discharged from any and all further liability except as to the party the court should adjudge en-

*Reference preceded by "A" refer to respondent Conboy, Hewitt's Appendix and references preceded by "AA" refer to petitioner's Appendix both filed in the recent appeal to the Court of Appeals for the Second Circuit, 78-7497.

titled to exercise the warrant. (A 15) Fiel was enjoined from transferring or hypothecating 4,500 shares of Electro in his possession, and Oppenheimer and Fiel were permanently enjoined from suing Electro on account of said warrant. The 4,500 shares then held by Fiel had been inadvertently issued to him in connection with a stock split. These facts were disclosed in paragraph 21 of the interpleader complaint. No appeal was ever taken from this order.

Thereafter, on four separate occasions, Oppenheimer attempted to vacate Judge Metzner's order. All of these motions were denied and resulted in the order of the Hon. Morris Lasker which stated in part that,

> "In view of the history of Oppenheimer's harassing tactics he is ordered not to make any further motions in this action prior to trial without the express approval of the Court. The instant motions as the other judges of this Court have observed as to prior motions, are an intolerable abuse of the Court's process and a waste of judicial resources—at a time when the courts are already over burdened by important issues of the day the disposition of which is delayed by frivolous litigation such as this."

A trial was held on the interpleader action and a final decree dated June 21, 1974 by Judge Motley held that as between Oppenheimer and Fiel, Oppenheimer was entitled to possession of the shares underlying the warrant. Judge Motley's Memorandum Opinion and Order (A 29) held that Fiel was liable to Oppenheimer for any damages which Oppenheimer could prove he suffered as a result of Fiel's actions in helping to deprive Oppenheimer of his right to exercise the warrant. The Court stated that the issue of damages as to Fiel would be tried during the trial of the

instant case (70 Civ. 5667) and noted that "Oppenheimer may also be entitled to costs and counsel fees as against Fiel and/or others to be determined at the trial of 70 Civ. 5667 upon a showing of bad faith." (A 41)

Oppenheimer moved on May 1, 1974 to amend his complaint, and on or about September 3, 1974, Conboy, Hewitt was served with the amended complaint in the instant action. Several other defendants were added in that amended complaint. Oppenheimer was permitted to serve the amended complaint upon a number of defendants in the action, but the Court denied his right to serve the amended complaint upon Electro and Registrar and Transfer Company. Oppenheimer appealed from so much of the order as denied his motion to serve the amended complaint upon Electro and Registrar and Transfer Company and a motion to dismiss that appeal was granted by an order of the Court of Appeals for the Second Circuit. That order also directed consolidation of the two actions.

On or about October 17, 1974, Conboy, Hewitt was served with the second amended complaint in this action. The complaints against Conboy, Hewitt alleged that Conboy, Hewitt brought an action in interpleader on behalf of their client, Electro, as part of a conspiracy to deprive Oppenheimer of his rightful possession of the warrant in question. Whether the bringing of the interpleader action was in any way part of a scheme had already been decided in a prior decision on November 30, 1970 wherein it was stated, ". . . Under the circumstances, [Electro] was fully justified in bringing this interpleader suit wherein the injunction was granted." (A 1)

The complaints against Conboy, Hewitt also claimed that as part of the alleged conspiracy and scheme, Conboy, Hewitt caused a false and misleading registration state-

ment to be filed with the Securities and Exchange Commission on behalf of Electro. It is sufficient to point out that nowhere in the complaints did Oppenheimer allege that he purchased or sold any securities as a result of the allegedly false or misleading registration statement or other documents filed with the Securities and Exchange Commission. Indeed, the complaint shows that the warrant in question was issued to Oppenheimer on June 29, 1965 and that he attempted to exercise it on February 12, 1968, before the registration statement was filed. In the meantime he gave up possession of it to a third party with the result that adverse ownership claims were made on the warrant.

Conboy, Hewitt moved to dismiss the second amended complaint pursuant to Rule 12(b)(6) F.R.C.P. and for summary judgment pursuant to Rule 56 F.R.C.P. In a decision filed August 15, 1975, Judge Motley granted summary judgment in favor of Conboy, Hewitt, finding that not only did Oppenheimer fail to allege a purchase or sale of securities but Oppenheimer also failed "to satisfy the requirements that these defendants knew at the time the registration statement was filed that the information contained therein was false and contained material misleading information." (AA 279) The Court concluded that "[N]either plaintiff's complaint nor his amended complaints factually support claims of such requisite knowledge or intent to defraud with respect to any of the above defendants either individually or as part of a conspiratorial scheme." (AA 281) The Court further noted that "[P]laintiff never alleged that he was *harmed* by any misrepresentation or omission in connection with the purchase or sale of such securities; he merely states the dispute as to ownership was erroneously not

included in the registration statement." (AA 280) Oppenheimer appealed that decision and then moved to withdraw that appeal. The Court of Appeals permitted Oppenheimer to withdraw that appeal without prejudice to filing a notice of appeal after a final determination of all pending proceedings in the court below. (AA 290)

On December 30, 1975, trial was held in the two consolidated actions. Counsel for Oppenheimer and counsel for defendants Fiel, Herbierto Febus Bernardini and Mariano Cabrera appeared and argued and the remaining party defendants Benjamin Rodriguez, Madrid Hotel Corporation and Cesar Febus Bernardini did not appear. A default judgment had previously been entered against the last three defendants on November 15, 1974. After trial, decision was reserved. Thereafter, findings of fact and conclusion of law were made and an order was entered on September 15, 1976 discontinuing the two consolidated actions. (AA 70) Oppenheimer then moved to amend the findings of fact and conclusions of law. This was denied in an order dated May 10, 1978.

By an order entered September 13, 1978, Judge Motley awarded judgment to Oppenheimer against defendants Fiel, Benjamin Rodriguez, Cesar Febus Bernardini and Madrid Hotel Corporation and dismissed Oppenheimer's complaint against defendants Herbierto Febus Bernardini and Mariano Cabrera. That order cited the previous decree of Judge Motley dismissing the second amended complaint as against Conboy, Hewitt. (AA 19)

Oppenheimer appealed from Judge Motley's final judgment dated October 28, 1975, awarding summary judgment to defendant Conboy, Hewitt, among others. The Court of Appeals for the Second Circuit unanimously affirmed the final judgment in all respects.

REASONS FOR DENYING THE WRIT AS TO RESPONDENTS CONBOY, HEWITT, O'BRIEN & BOARDMAN

Beneath the litigigious veneer of this case, there is nothing more than an attempt by petitioner to obtain the right to exercise a stock purchase warrant. The opinion of the Court of Appeals for the Second Circuit demonstrates that petitioner's attempt to elevate this case to the status of a constitutional infringement has no basis in law or fact. The Court of Appeals gave short shrift to petitioner's claims because of their obvious lack of merit. The record of this case which stretches over a decade of litigation clearly establishes that petitioner has had his day in court.

The courts correctly dismissed petitioner's purported claim under §10(b) of the Securities Exchange Act of 1934. Since the decision of the United States Supreme Court in the case of *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723 (1975), it is beyond cavil that in order to establish a valid claim under §10(b) of the Securities Exchange Act of 1934, a plaintiff must plead and prove that he purchased or sold securities in connection with the alleged fraud. In the instant action Oppenheimer made no such allegations in his second amended complaint.

The decision of the Court of Appeals with respect to petitioner's purported claim under §17(a) of the Securities Act was obviously also correct. "[O]nly a purchaser of securities may invoke the provisions of §17(a) of the Securities Act." *Stirling* v. *Chemical Bank,* 382 F.Supp. 1146, 1150 (S.D.N.Y. 1970), *aff'd.* 516 F.2d 1396 (2d Cir. 1975). *See, also Birnbaum* v. *Newport Steel Corp.,* 193 F.2d 461, 463 (2d Cir.), *cert. denied,* 313 U.S. 956 (1952); *Kellman* v. *ICS Inc.,* 447 F.2d 1305, 1308-1309 (6th Cir. 1971); *Duffy* v. *Ranger Securities Corp.,* 346 F.Supp. 1401, 1405 (E.D.N.Y. 1972). Oppenheimer failed to allege, in his pleadings, that

he purchased any securities in connection with the alleged fraud with which Conboy, Hewitt is charged.

As the Court of Appeals still further held, the claim that Conboy, Hewitt (among others) violated 28 U.S.C. 1343 simply has no merit. The claim appears to be the result of an erroneous interpretation of that statute and its companion, 42 U.S.C. 1985. Section 1343(1) grants jurisdiction over actions for damages for injury to person or property or for deprivation of rights by any act in furtherance of a conspiracy set forth in Section 1985, and Section 1343(2) grants jurisdiction over actions for damages against one who fails to prevent wrongs mentioned in Section 1985 where such a person had knowledge that the wrongs were about to occur and had power to prevent them. Section 1985, in turn, is designed to protect rights embodied in the Constitution and laws of the United States and the section does not grant jurisdiction unless a person is deprived of such rights. *See, Johnston* v. *National Broadcasting Co., Inc.,* 356 F.Supp 904 (E.D.N.Y. 1973). While it is not clear what civil right Oppenheimer is claiming was violated, it is clear that the right to exercise a warrant is not among those rights contemplated by Section 1985.

Section 1343(3) grants jurisdiction over an action for the deprivation of any right secured by the United States Constitution under color of state law, statute, ordinance, regulation, custom or usage. Inasmuch as Oppenheimer has made no claim that he was deprived of his right to exercise the warrant under color of state law that subdivision is inapplicable. Section 1343(4) grants jurisdiction over an action "To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." Even if Oppenheimer had stated a claim

under the securities laws, it is clear that those laws are not contemplated by Section 1343(4). *Eisen* v. *Eastman,* 421 F.2d 560 (1969); *McCall* v. *Shapiro,* 416 F.2d 249 (1969); *Wallach* v. *Cannon,* 357 F.2d 557 (1966); *Stampinato* v. *M. Breger & Co., Inc.,* 270 F.2d 46 (1959); *Koll* v. *Wayzata State Bank,* 397 F.2d 124 (1968). *See, also, Dillard* v. *Family Court, Queens County,* 404 F.2d 404 (1968); *McManigal* v. *Simon,* 382 F.2d 408 (1967); *Ream* v. *Handley,* 359 F.2d 728 (1966); and *Collins* v. *Hardyman,* 341 U.S. 651 (1951).

Again it is not clear from the petition in which manner Oppenheimer claims his civil rights were violated. It is submitted that the only alternatives are the filing of the registration statement on behalf of Electro, which occurred in 1968, the bringing of the interpleader action by Electro in 1969, or the manner in which service was made of Judge Pollack's order to show cause in 1969. No other construction can be placed upon the pleadings and, indeed, these are essentially the only allegations made against Conboy, Hewitt.

The applicable statute of limitations to such claims, assuming *arguendo* their validity, is a New York imposed three year limitation period. See *Johnson* v. *Dailey,* 479 F.2d 86 (1976); *Romer* v. *Leary,* 425 F.2d 186 (1970). Under this statute of limitations, the claims first brought against Conboy, Hewitt in 1974 with respect to alleged acts in 1968 and 1969 are barred.

In affirming the lower court, the Court of Appeals did not discuss the bar of *res judicata,* but traditional principles of *res judicata* barred petitioner's claim. Oppenheimer claimed in his complaints against Conboy, Hewitt that this defendant brought the interpleader action on behalf of Electro as part of an alleged conspiracy to deprive him of

his rightful possession of the warrant. However, in order to recover on this theory, Oppenheimer must prove that Electro was not justified in bringing the interpleader action at the time it found itself presented with the conflicting claims of himself and Fiel to the right to exercise the warrant, and that Electro should have given preference to his claim and ignored Fiel's.

This very issue had been decided by the District Court in the decision of Judge Weinfeld in 1970 which held that Electro was fully justified in bringing the interpleader suit. (A 1) At the bottom of the instant case, Oppenheimer is seeking to relitigate that issue in this action, and, in effect, overturn that holding, from which no appeal was ever taken. This attempt is barred by traditional principles of *res judicata. Klein* v. *Spear, Leeds & Kellogg,* 306 F. Supp. 743 (S.D.N.Y. 1969) and 309 F. Supp. 341 (S.D.N.Y. 1970). See also *Israel* v. *Wood Dolson Co., Inc.,* 1 N.Y.2d 116 (1956); *Zdanok* v. *Glidden Co., Durkee Famous Foods Division,* 327 F.2d 944 (2d Cir. 1964), *cert. denied,* 377 U.S. 934. This decade long litigation was properly brought to an end by the Court of Appeals.

It is impossible to discern from the petition any question of significance for this Court's determination. The petition serves only to emphasize that this case has no importance beyond the particular facts and parties involved. The failure of petitioner to cite any cases in support of his petition demonstrates that the case was properly decided by the Courts below. The petition fails to set forth any considerations of the character enumerated in Rule 19 of this Court which traditionally have influenced the Court to grant certiorari.

CONCLUSION

For the reasons stated, the petition for a Writ of Certiorari should be denied.

Dated: New York, New York
November 9, 1979

Respectfully submitted,

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